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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1761

DISTRIGAS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–19a) is reported at 495 F.2d 1057. The principal order of the Federal Power Commission (*id.* at 20a–27a) and its order denying rehearing (*id.* at 28a–41a) are reported at 49 FPC 1145 and 1400, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1974. The petition for a writ of certiorari was filed on May 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may properly condition import authorizations granted under Section 3 of the Natural Gas Act to provide for comprehensive regulation of the transportation and the sale for resale of imported natural gas in this country, and facilities related to those activities, where it reasonably determines that such regulation is required in order to ensure that the public interest is adequately protected.

2. Whether the Federal Power Commission, having once declined to exercise its authority to impose conditions upon an import authorization, may properly enter a supplemental order imposing such conditions, after opportunity for hearing and on the basis of appropriate findings of public need.

STATUTES INVOLVED

Sections 1, 2, 3, 7(c), 7(e), and 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717, 717a, 717b, 717f (c), 717f(e), and 717r(b), are set forth at Pet. App. 64a–69a.

STATEMENT

1. In an application filed on February 17, 1970, as amended on September 29, 1970, Distrigas Corporation (Distrigas) sought authorization from the Federal Power Commission under Section 3 of the Natural Gas Act, 15 U.S.C. 717b, to import up to 14 shiploads of liquefied natural gas (LNG) per year for 20 years into this country from Algeria.[1] The LNG was to be delivered to Distrigas at Everett,

[1] Each shipload of LNG is the liquid equivalent of approximately 1.1 billion cubic feet of gaseous natural gas.

Massachusetts, and Staten Island, New York, where terminal, storage, regasification, and related facilities were to be constructed by the company. Distrigas proposed to sell the LNG to distribution companies both within and without the states of importation. Distrigas requested in its application that the Commission issue a "disclaimer of jurisdiction" over those aspects of its project not subject to Commission jurisdiction under the Act.

Formal public hearings were held on the Distrigas proposal and, on June 14, 1971, the presiding examiner issued his initial decision in the case recommending that the requested import authorization be granted subject to certain conditions. He also concluded that, under *Border Pipe Line Company* v. *Federal Power Commission*, 171 F. 2d 149 (C.A. D.C.), the importation of natural gas is not "interstate commerce" as defined in Section 2(7) of the Act, 15 U.S.C. 717a(7).[2] Accordingly, he determined that, as to its sales and transportation of LNG within the states of importation, and as to its import facilities, Distrigas is not a "natural gas company" as defined in Section 2(6) of the Act, 15 U.S.C. 717a(6), and that these aspects of the Distrigas project are not subject to regulation by the Commission.

Exceptions to the initial decision were filed by several parties and, on March 9, 1972, the Commission issued its Opinion No. 613 (Pet. App. 42a–60a) granting authorization of the import proposal. The Commission held that transportation and sales for resale of the imported LNG to customers *outside* the states

[2] In *Border*, the court of appeals held that the exportation of natural gas is not "interstate commerce" under the Act.

of importation were subject to comprehensive regulation under the Act (*id.* at 49a–50a). But it agreed with the examiner's determination that the importation of LNG does not constitute "interstate commerce" as defined in the Act (*id.* at 49a) and that the Distrigas import facilities, as well as the company's sales and transportation of LNG *within* the states of importation, "are therefore outside of our jurisdiction" (*id.* at 52a).[3]

Chairman Nassikas and Commissioner Moody filed separate dissents to the majority opinion, stating that, as a matter of law and policy, the Commission should assert jurisdiction over the entire Distrigas project.[4]

2. In late 1972 and early 1973, Distrigas and one of its affiliates filed several applications with the Commission proposing a substantial expansion of the import project. Distrigas sought authorization under Section 3 of the Act to import considerable additional quantities of LNG, and both companies requested certificate authorization under Section 7, as amended, 15 U.S.C. 717f, for the transportation and sale for resale of LNG to customers in states other than the states of importation. In addition, another affiliate

[3] The majority noted that it had ample authority under Section 3 of the Act to assert jurisdiction over all aspects of the Distrigas project as a condition to its import authorization (Pet. App. 52a). It declined to so condition the authorization, however, finding that, on balance, such an assertion of jurisdiction would not serve the public interest (*id.* at 52a–58a). The Commission cautioned, however, that it was empowered under Section 3 to modify import authorizations from time to time as required by the public interest (*id.* at 58a).

[4] Rehearing was thereafter denied (47 FPC 1465). A petition for review was filed but later dismissed on motion of the petitioner (Pet. App. 8a).

applied for authorization under Section 7 to construct a pipeline between Staten Island, New York, and Woodbridge, New Jersey, for use in the delivery of regasified LNG to New Jersey customers.

In light of these filings, the Commission, on May 25, 1973, issued the first of the orders at issue in the present case (Pet. App. 20a–27a). It stated that the new applications showed clearly that the complexion of the Distrigas project had changed considerably since the issuance of Opinion No. 613 (*id.* at 22a). The project had become primarily interstate rather than intrastate in nature, and it had become clear that the import facilities in Massachusetts and New York would be used in the interstate transportation and sale for resale of natural gas (*ibid.*). The Commission held that, in these circumstances, it was required under the Act to exercise jurisdiction over the construction and operation of these facilities; it accordingly ordered Distrigas and its affiliates to submit the necessary applications pursuant to Section 7 (*id.* at 22a–23a).[5]

In its subsequent order denying rehearing (*id.* at 28a–41a), the Commission stressed that Opinion No. 613 had involved the first large-scale, long-term LNG import project and that the majority in that case had cautioned that its decision represented only the first step in the development of a comprehensive Commission policy on LNG imports (*id.* at 29a–30a). It also emphasized that the jurisdictional policy expressed in

[5] Commissioner Brooke dissented (Pet. App. 24a–27a) on the ground, *inter alia*, that the Commission was bound by its earlier disclaimer of jurisdiction over the Distrigas facilities in Opinion No. 613.

Opinion No. 613 had already been abandoned in other cases (*id.* at 31a).[6]

The Commission rejected the claim that LNG import facilities were not, in any event, properly within its jurisdiction under the Act. It reasoned as follows. Section 1(a) of the Act, 15 U.S.C. 717(a), expresses a clear congressional policy that federal regulation of the sale and transportation of natural gas in both interstate and foreign commerce is necessary in the public interest (*id.* at 31a–32a). In light of this policy, the definition of the term "interstate commerce" in Section 2(7) of the Act must be read to encompass the importation of LNG (*id.* at 32a).[7] LNG import facilities are therefore used in the transportation of natural gas in "interstate commerce" and are subject to comprehensive regulation by the Commission under the Act (*id.* at 32a–33a). Sales of imported LNG for resale, both within and without the states of importation, also occur in "interstate commerce" and are thus within the Commission's jurisdiction (*ibid.*). "To the

[6] See Opinion No. 622, 47 FPC 1624, where the Commission asserted jurisdiction, pursuant to Section 7 of the Act, over the construction and operation of the import facilities involved in another LNG project.

[7] Section 2(7) defines "interstate commerce" as "commerce between any point in a State and any point outside thereof * * *, but only insofar as such commerce takes place within the United States." The Commission reasoned that, when LNG is imported, commerce occurs between a "point in a state" (the American port where the LNG is delivered) and a "point outside thereof" (the foreign country where the shipment originates) (see Pet. App. 32a).

extent the *Border* decision could compel a contrary result, that holding is in error" (*id.* at 32a).[8]

3. On review, the court of appeals rejected the Commission's finding that the importation of natural gas is "interstate commerce" under the Act, holding that such an interpretation of the statute is contrary to the decision in *Border, supra* (*id.* at 13a–14a). The court agreed with the Commission that "neither the language nor the legislative history of the Act's interstate commerce definition unambiguously establishes the correctness of the *Border* construction" (*id.* at 13a), but it declined to overrule that decision because it was not "convinced that *Border's* construction would inevitably place imports of natural gas into * * * [a] regulatory gap" (*id.* at 14a).

The court reasoned that the Commission has authority under Section 3 of the Act to assert jurisdiction over import facilities, and over all sales of imported LNG, as a condition to its grant of import authorization, if it finds that such a condition is required by the public interest (*id.* at 14a–15a). Accordingly, no "attractive regulatory gap need result if *Border* is allowed to stand" (*id.* at 14a).

The court rejected the contention that the Commission was barred by its disclaimer in Opinion No. 613 from exercising jurisdiction over the facilities and sales of Distrigas. It emphasized that Section 3 specifically authorizes the Commission to modify pre-

[8] The Commission found that its assertion of jurisdiction over the Distrigas facilities could also be based on a theory of "commingling," since the facilities would be used in connection with concededly jurisdictional sales to customers located in states other than the states of importation (Pet. App. 32a–33a).

viously granted import authorizations, and that Opinion No. 613 itself had "frankly warned Distrigas that its jurisdictional decision was tentative" (*id.* at 16a).

Since the Commission had not based its assertion of jurisdiction on Section 3 of the Act, it had not held a hearing or made the findings required by that section prior to the modification of the import authorization. The court of appeals therefore set the orders aside and "remand[ed] the record for supplementation, with directions that the Commission conduct the hearing required by Section 3 and that it supply findings and reasons to support its jurisdictional determination under Section 3's public interest standard" (*id.* at 19a).[9]

ARGUMENT

1. Petitioners contend (Pet. 11–13) that the Commission has no authority under Section 3 of the Act to attach to an LNG import authorization conditions reasonably designed to ensure that the importation will not unduly injure domestic commerce and will not harm the legitimate interests of the consuming public. With respect to the importer's facilities and sales within the state of importation, petitioners say that the Commission has no regulatory jurisdiction save the power to allow or disallow the importation itself.

[9] The court made clear, however, that the Commission will not be limited on remand to making a Section 3 determination. "[N]othing in this opinion precludes the Commission, on remand, from reverting to the commingling theory [see note 8, *supra*], rather than turning to Section 3, if it does so in a manner that allows responsible judicial review" (Pet. App. 19a).

There is, however, no basis in the Act for so narrow a reading of the conditioning authority conferred on the Commission by Section 3. In disposing of an application for import authorization, the Commission is empowered to "grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate * * *." That authority, as the court of appeals correctly stated, "is at once plenary and elastic" (Pet. App. 14a); it "supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power" (*id.* at 15a). "So long as its conclusion is reasonable and reasonably supported by substantial record evidence" (*id.* at 14a), the Commission may properly determine that the public interest requires a condition subjecting the importer's facilities and sales to close Commission regulation.

In any event, the issue need not be reached in the present posture of the case. The Commission has taken no final action under Section 3 to impose the sort of condition discussed by the court of appeals. If it determines not to do so, there would be no need to resolve in this case the abstract issue of whether it *could* attach such a condition. If it does impose a condition, petitioners will be able to litigate the Section 3 issue on review of that action and in the light of the precise language and justification of a concrete condition.

2. Petitioners also contend (Pet. 13–15) that any imposition of Section 3 conditions by the Commission would amount to an improper "retroactive revoca-

tion" (Pet. 14) of the prior import authorization. Section 3 specifically provides, however, that the Commission "may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate." In its initial authorization, the Commission quoted that portion of Section 3 and cautioned that it "recognizes its responsibility and authority to take such action if and when the public interest so requires" (Pet. App. 58a).

In any event, this claim is hypothetical in the present circumstances. The Commission has not exercised its authority under Section 3 to enter a "supplemental order." The propriety of such an order may be litigated if and when it is issued.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

LEO E. FORQUER,
General Counsel,
GEORGE W. MCHENRY, JR.,
Solicitor,
JOHN R. STAFFIER,
Attorney,
Federal Power Commission.

SEPTEMBER 1974.

[10] Similarly, there is no need to determine at this stage of the proceeding whether the Commission's initial refusal to assert jurisdiction would foreclose an assertion of jurisdiction on remand based either on the commingling theory (see notes 8 and 9, *supra*) or on some other ground.

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